No. 73-492

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

KUNSTSAMMLUNGEN ZU WEIMAR,

Petitioner,

—against—

FEDERAL REPUBLIC OF GERMANY, EDWARD I. ELICOFON and ELISABETH MATHILDE ISIDORE ERBGROSSHERZOGIN VON SACHSEN-WEIMAR-EISENACH (GRAND DUCHESS OF SAXONY-WEIMAR),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner respectfully moves the Court for an order granting a rehearing; vacating its denial of the petition for writ of certiorari entered on February 19, 1974; and granting the petition. As grounds for this motion, petitioner states, as follows:

1. The normalization of relations between the GDR Government and the Federal Republic Government will not afford adequate protection to petitioner in respect of the stolen Duerer paintings.

On December 3, 1973 this Court invited the Solicitor General to file a brief expressing the views of the United States. Shortly thereafter, the Solicitor General submitted a Memorandum for the United States as *Amicus Curiae,*

stating that "the Executive Branch would not object if petitioner were granted leave to intervene in the district court in the action instituted by the Federal Republic" (Memorandum for the United States, at 4-5).

Even though the exclusion of petitioner from this action was grounded primarily on the notion that to permit its intervention would conflict with our Executive's nonrecognition policy, and the Executive no longer objects to petitioner's participation, the Court denied the petition for certiorari. The denial of certiorari, we believe, may have been inspired by the Solicitor General's observation that "[t]he Department of State understands that if the Federal Republic were to prevail in its replevin action against the respondent Elicofon, the paintings which form the subject of the action would shortly be turned over by the Federal Republic to the GDR" (Memorandum for the United States, at 4). And by the Federal Republic's statement, in its supplemental brief, that it "has no objection to this case being remanded" to the court of appeals "for reconsideration or for a stay of all proceedings due to changed circumstances." The Court may have concluded that the interests of petitioner would be adequately protected by the Federal Republic, and that there was thus no need for it to address the difficult questions of constitutional and international law presented by the petition.

If these were the considerations which moved the Court to deny certiorari, the Court was misinformed. For, notwithstanding the significant recent changes in the relations between the GDR and the Federal Republic governments (which we believe themselves warrant a reversal of the decisions below), we have yet to be formally advised by the Federal Republic that, should it continue in the action and prevail, it would turn the paintings over to the GDR Government. The two governments have substantially normal-

ized their relations, but the process is by no means complete, and there is simply no guarantee that the Federal Republic, if successful, would in fact turn the paintings over to the GDR Government.

What is more significant, however, is that respondent Elicofon has made plain that he has no intention of permitting the Federal Republic to continue in the action in the event petitioner is excluded. Elicofon has indicated that he will move to dismiss the Federal Republic's action on the grounds that it has no claim of title to or interest in the paintings and no representative capacity to sue to recover them on behalf of the rightful owner. Even if this threshold challenge to standing were met by the Federal Republic, it might well be found when the merits are reached that its claim of title to the paintings is defective.* Accordingly, the continued participation of the Federal Republic in the action and its chances of success are by no means certain; and that the Federal Republic may intend to transfer the paintings to the GDR if it is successful does not obviate the need for petitioner's participation in the case if its interests are to be adequately protected.

2. The imminence of recognition is no reason to deny certiorari.

We believe that formal recognition of the GDR Government by the United States Government is imminent. Indeed, we have suggested that recent events have already led to implied recognition of the GDR Government, and

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* The district court intimated that it views any claim to the paintings as one to be asserted on behalf of the people of East Germany. But no evidence has yet been taken on the question of title. When it is, the district court may well conclude that the Federal Republic cannot speak for the people of East Germany or, as we have urged, that the claim can only be asserted by petitioner. (See Petition for Certiorari, at 19.)

that consequently the GDR Government (and, *a fortiori*, petitioner) should be permitted to sue in this case. Cognizant of this Court's policy to avoid decision on delicate questions of constitutional and international law where reasonable alternatives to decision exist, see, *e.g.*, *Kovacs* v. *Brewer*, 356 U.S. 604 (1958); *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450 (1945), we understand how the prospect of early recognition might have created the impression that political developments might obviate the need for the Court to reach and resolve the important questions before it.

If certiorari was denied because of such considerations, the Court overlooked an essential point which was only briefly adverted to in our supplemental brief (at p. 6, note). If the GDR Government were shortly to be recognized by the United States, and petitioner thereupon commenced a new action for return of the paintings or renewed its motion to intervene in the pending action, Elicofon would doubtlessly insist that, notwithstanding recognition of the GDR, petitioner should then be barred by the statute of limitations.

We believe that such a challenge on statute of limitations grounds would prove unsuccessful, in view of Judge Rifkind's decision in *Steingut* v. *Guaranty Trust Co. of New York*, 58 F. Supp. 623, 637 (S.D.N.Y. 1944), *modified in part on other grounds, aff'd in part*, 161 F.2d 571 (2d Cir. 1947), *cert. dismissed*, 332 U.S. 753 (1947), *cert. denied*, 332 U.S. 807 (1947), which establishes that the statute of limitations is tolled during the period of nonrecognition under circumstances such as those here. There is, however, authority to the contrary. See, *e.g.*, *Union of Soviet Socialist Republics* v. *National City Bank of New York*, 41 F. Supp. 353 (S.D.N.Y. 1941).

And so resolution of the question of Kunstsammlungen's capacity to sue in the present case rather than in a newly commenced action (or on a new motion to intervene) is most desirable. For, inaction by this Court because of the changing political climate will merely create these additional statute of limitations questions, which will inevitably come to this Court for decision. The interests of judicial efficiency would better be served if petitioner's right to sue were confirmed within the framework of the pending actions.

3. In light of the withdrawal of our Executive's objection to suit by petitioner, the doctrine of nonrecognition should not bar petitioner from suing to recover the Duerer paintings.

That certiorari was denied notwithstanding the fact that the Executive Branch no longer has any objection to petitioner's intervention suggests that the Court has misapprehended the parameters of the nonrecognition doctrine recently suggested in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964).

In the petition for certiorari, we sought to demonstrate that even if the doctrine of nonrecognition retained some vitality, it should not be viewed as an invariable rule which prohibits the judicial branch from accepting a foreign government (or a national closely related to it) as a plaintiff in *every* court and in *every* case. The rule was never intended to be so rigidly applied. Rather, as the *Sabbatino* Court made clear, diplomatic nonrecognition furnishes no reason absolutely to bar suit by an unrecognized government; it should preclude suit only where the underlying policy reasons for closing the courts to the foreign government suitor transcend the interests of the parties in securing a judicial determination of their rights.

As we pointed out in the petition for certiorari (at p. 10), the justification usually advanced for barring an unrecognized government from our courts is that to permit suit would be to compromise the policies underlying nonrecognition and impede the Executive's exercise of his foreign affairs function; the fear is that the resultant "judicial recognition" would both embarrass the nonrecognizing executive and dilute the effect of nonrecognition.

In this case, however, such fears have been completely dispelled by the Executive Branch's acknowledgment that it is agreeable to petitioner's participation. Our Executive has not gone so far as expressly to recognize the GDR Government; but by its declaration, it has informed the Court that to permit petitioner to sue here would *not* result in embarrassment to the Executive, cause conflict between the courts and the State Department, or give rise to any of the other dangers supposedly inherent in the acceptance of unrecognized governments as litigants. Moreover, the policy underpinnings of our Executive's nonrecognition of the GDR Government—*i.e.*, deference to the views of the Federal Republic which long saw itself as the only legitimate spokesman for the people of East Germany—are no longer relevant in light of the normalization of relations between the Federal Republic and GDR governments.

4. Petitioner has clearly met the guidelines for granting the writ laid down in Rule 19.

In his reply brief submitted in response to the Memorandum for the United States, Elicofon argued that petitioner failed to meet the requirements of Rule 19 because, among other things, its case did not present a novel question of federal law requiring decision by this Court. Our petition for certiorari, however, clearly shows that novel questions of federal law are presented here. This is further

demonstrated by the pointed reference in *Sabbatino* to the literature criticising the "doctrine that nonrecognition precludes suit by the foreign government in every circumstance" (376 U.S. at 411, n. 12), a clear signal of the Court's willingness to reconsider the doctrine, even though that could not be accomplished in the framework of the *Sabbatino* case. See Falk, *The Complexity of Sabbatino*, 58 Am. J. Int'l L. 935, 950, n. 49 (1964).

This case presents the Court with its first opportunity to confront the rule and make some sense out of it. The importance of the questions presented is underscored by their constitutional ramifications. The decisions below prevent a foreign national from obtaining any judicial determination of its rights to property stolen and transported to the United States, thus immunizing the thief's "title" from challenge in the courts and raising grave questions of substantive due process. And the due process considerations are all the more critical in view of the distinct possibility that the Federal Republic may be removed as a party plaintiff, thus leaving no party whatever even remotely connected with the true owner of the paintings.

Clearly, then, one cannot seriously dispute that this case poses important questions of federal law which have not been, but should be, settled by this Court.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and either remand to the district court with a direction to permit intervention, or, in the alternative, review the decisions below.

Respectfully submitted,

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March, 1974

Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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